# Case and Comment.

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS.
INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED.
LEGAL NEWS NOTES AND FACETIÆ.

VOL. 2. MAY, 1896. NO. 12.

CASE AND COMMENT.

Monthly. Subscription, 50 cents per annum postpaid.

THE LAWYERS' CO-OPERATIVE PUB. CO.,
Rochester, N. Y.

Branch Offices: { New York, 177 Broadway. Chicago, Rand-McNally Bldg. Boston, 10 Tremont Street.

Entered at postoffice at Rochester, N. Y., as second-class mail matter.

## Horace Gray.

On the list of the things of which Massachusetts is proud her judiciary is near the head. The judges she has sent to the bench of the Supreme Court of the United States are only four in number, but the little group is illustrious. Horace Gray was appointed from that state to be a Justice of the Supreme Court after it had been adorned by the learning and ability of William Cushing, Joseph Story, and Benjamin R. Curtis, whose respective terms of service had been from 1789 to 1810, 1811 to 1845, and 1851 to 1857. The appointment of Mr. Justice Gray was made by President Arthur on December 20, 1881. It met the instant and emphatic approval of the country. As in the case of William Cushing, the first Chief Justice of Massachusetts under a state Constitution, his appointment deprived the supreme judicial court of the state of its Chief Justice. He had been Chief Justice of that court since 1873, and prior thereto an associate justice of that court since 1864. His services in these positions had given him great prominence among the judges of the country. Prior to his judicial career, he was for about seven years, between 1854 and 1861, reporter of the supreme judicial court of Massachusetts, during which time he published the sixteen volumes of Gray's Reports.

During so many years of judicial service Mr. Justice Gray could not fail to write many important opinions. Some of them have become leading authorities on the subjects discussed, as in the case of Jones *v.* Habersham, 107 U. S. 174, 27 L. ed. 401. Their wealth of learning is remarkable, and appears incidentally whenever he touches a subject which can call it forth. Very often an opinion of Mr. Justice Gray constitutes an exhaustive treatise on the subject discussed. A good illustration of this is his recent opinion upon the subject of general average in the case of Ralli *v.* Troop, 156 U. S. 386, 39 L. ed. 742, or his still more recent opinion respecting the conclusiveness of foreign judgments, in the case of Hilton *v.* Guyot, 159 U. S. 113, 40 L. ed. 95. In each of these opinions, as in many others which he has written, there can be found a more exhaustive and thorough review of the authorities applicable to the subject than had ever before been made.

The literary style of the opinions of Mr. Justice Gray is polished and elegant. It is never labored nor confused. On the other hand, it has nothing of that nervous or electric quality which, by sharply-cut statements closely packed, may be used to compel attention. It is rather a full and flowing style which leads the reader along pleasantly through an ample development of the questions discussed, making everything entirely lucid. It is calm, clear, and scholarly.

Boston is the birthplace of Mr. Justice Gray, and he was born March 24, 1824. He graduated at Harvard College in the class of 1845. Following this he traveled extensively in Europe and on returning prepared for the practice of law by studying in the Harvard Law School and in the office of Judge Lowell.

## Headnotes Again.

The comment upon headnotes by John Brooks Leavitt on page 3 of his recent work

on The Law of Negligence in New York is as just as it is vigorous. He says:

"The true office of the syllabus is in danger of being forgotten in this state. As once understood, it was to present in a carefully thought-out, compactly worded proposition the rule of the case. Such no longer seems to be the plan upon which our headnotes are composed. Isolated sentences from the opinion, which state, merely by way of argument, well-known principles, settled for many years, are hastily made to stand as points decided for the first time. Or a body of ill-digested facts is pitch-forked into the syllabus, a 'Held' clapped on as a tail, and that is called a headnote! In several instances of late, two solid pages of facts in fine type will be found served up to the profession as the syllabus. It may not be very gracious to say these things in cold print, but the evil is a growing one and will only be stopped by serious outcry."

The fact is that, in using such headnotes as Mr. Leavitt has described, lawyers often fail to realize that better ones ought to have been made. Those who know what headnotes ought to be have long realized the sore need of such criticism as this. Since it was written Mr. Edmund H. Smith has become the reporter of the court of appeals, and this set of reports will now show skilful work. Like New York, Illinois endured for many years unsatisfactory work by her official reporter. Mr. Freeman's headnotes often consisted of undigested chunks of the opinion, and sometimes failed to state the real points decided. But the present reporter, Mr. Isaac N. Phillips, does admirable work. Our own views on this subject of headnotes were stated in the May, 1895, number of "Case and Comment." We have wondered at the long-suffering patience of the profession with those reporters who lack either skill or diligence to make headnotes which present the points decided clearly, fully, accurately, and sharply.

## Injunction to Protect Personal Rights.

The doctrine that equity will not interfere to protect personal rights as distinguished from rights in property is applied in a late Maryland case by denying an injunction to prevent the shadowing of a person by a detective. The decision may be the only one that could be rendered without repudiating the oft-expressed rule on the subject. But if the question were considered upon principle rather than precedent a different decision would be required. Personal rights are more regarded now than a few centuries ago. At any rate, a plain denial of justice is not made satisfactory by the reflection that Englishmen and Americans have never had any remedy in such cases. Property rights were the chief concern of the common law. The hard-headed makers of England and English law were ready to settle most personal grievances by knock-down arguments without troubling the courts concerning them. Attempts to take such matters into the courts do not seem to have met with much favor. The result is that property is much better protected than personal rights are. Repeated and threatened injuries to property may be stopped by injunction, but not so with libel, slander, or the annoyance, insult, and degradation caused by the shadowing of a person by detectives, even when the injury thereby caused is great and irreparable.

If the courts can find no way to do justice in such cases, they ought to be aided by statute. If the constitutional right to a jury trial prevents an injunction in such cases, the legislature ought to provide for a jury trial of the issues of fact in injunction cases, and authorize as full relief by injunction to prevent personal injuries as can be granted to protect property rights. In some way, surely, courts ought to have power to grant injunctions against threatened irreparable wrong which, if committed, they have power to punish, but cannot adequately redress. The homely proverb that "prevention is better than cure" would make a valuable addition to the list of legal maxims.

## The Law of Privacy.

Probably the state of civilization, rather than a disposition on the part of the common law to ignore personal rights, accounts for the fact that the law of privacy is yet an embryo without form and which scarcely has life. Only a few years ago the conditions were such that the necessity of a law securing privacy was hardly thought of. But now that newspaper enterprise is behind the times if it does not proclaim all that is done in the closet at midnight, from the surrounding housetops at sunrise, and culture has made people sensitive to the public stare, while there seems to be no armor invincible to the ever-present "button" and "flashlight," the question comes: Is there no protection, or must one submit to have his deeds and

likeness serve to gratify the idle curiosity of the multitude for the private purposes or emolument of a stranger? The question was passed upon in Corliss *v.* Walker, 31 L. R. A. 283, and Schuyler *v.* Curtis, 31 L. R. A. 286, and although in both cases injunctions were refused, yet in both the actions were by survivors of the person directly interested, and the courts held that there was nothing of which they could complain. Upon turning to the cases cited in the note to Corliss *v.* Walker, no case is found which directly involves the law of privacy until within the last few years. The few cases upon the subject show a tendency to uphold the right, one case even carrying it to an extreme. There the use of a negative of an actress was enjoined which was procured while she was enacting a role upon a public stage. That some protection should be afforded cannot be successfully disputed, but what the limit should be is a difficult question. There is little in the lives of the masses of private citizens to offer temptations to infringe their rights to privacy. And in most cases when the public becomes interested the question will arise, Has not some act been committed which has removed the mantle of privacy and made the person a public character, who has of his own volition surrendered his former position and rights? It would seem that at least the gratification of mere idle curiosity and the invasion of the right of privacy for pecuniary or other ulterior purposes should be stopped, and there is likely to be considerable litigation in the future for the definition and protection of this right.

## An Interesting Point in Libel Law.

An attempt to entrap a person into liability for the publication of a libelous letter by inducing him to permit others to read it is brought up in the case of Miller *v.* Donovan, recently tried in the Supreme Court in New York city. There it was shown that the person defamed had heard of the existence of such letter and sent agents to obtain sight of it. This they accomplished by concealing their relations to him and pretending that he had treated them badly. In a charge to the jury which fully covers the leading questions in the law of libel, Judge Giegerich summed up the law upon this point as follows: "I charge you that if the plaintiff invited and procured the publication of the letter for the purpose of making it the foundation of an action, it would be, in my opinion, most unjust that the procurer of the alleged wrongful act should be permitted to profit by it, unless there had been a previous publication of the letter by the defendant." Therefore the court charged that the verdict must be for defendant unless there had been a previous publication of the letter. This, although undoubtedly correct and quite analogous to the general doctrine as to the effect of instigation to crime as a defense to its prosecution, seems to be a novel point in the law of libel.

## Scorching.

Criminal liability for the reckless riding of a bicycle was visited with a sentence of four months' hard labor in the recent English case of Regina *v.* Parker, which was tried at Lewes assizes. The defendant was charged in an indictment for manslaughter and also for furiously driving a carriage or vehicle contrary to section 35 of the Offenses against the Person Act of 1861. The sentence was imposed upon a plea of guilty to the second indictment. This plea was accepted although the prosecution considered that a conviction for manslaughter would be supported. The Law Journal quotes Mr. Justice Hawkins as saying that the counsel for the prosecution had very mercifully asked only for a conviction on an indictment to which the prisoner was ready to plead guilty, and that he was glad that some one had thought fit to put the law in motion and let those who were careless and reckless of the lives of others know that they were punishable by the law. The Justice also said that a man or woman who rides a bicycle is bound to conduct it with care and caution, and no more entitled to ride recklessly and furiously than to drive a cart at a furious pace through the street.

Laws or ordinances on this subject, as on all others, are made only for those who are either mentally or morally deficient, and not for those who are intelligent and conscientious enough not to need them. The interesting and innocent party who, for time whereof the memory of man runneth not to the contrary, has been carrying a gun and did not know it was loaded, has now exchanged it for a wheel, and his works do follow him. His victim is often a fellow wheelman, but more often it is an elderly lady or small child. Pusillanimous

municipal authorities have in many places failed to check the increase of these crimes. In other places the authorities have been more effective. To make the law of the subject plain to the limited comprehension of scorchers, a few convictions of manslaughter will probably be necessary.

## Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

### Book 30, Parts 5 and 6.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.



The part containing any note indexed will be sent with Case and Comment for one year for $1.

## Among the New Decisions.

### Aliens.

The power of Congress to require state courts to entertain or act upon applications for naturalization, without the consent of the state, is denied in State, Rushworth, *v.* Judges of Common Pleas (N. J.) 30 L. R. A. 761. The time when and during which such applications may be heard in state courts under authority given by Congress is held subject to the control of the state legislature. In a note with this case are collected the authorities on the powers of state legislatures and courts in respect to naturalization.

PORTRAIT SUPPLEMENT.—"CASE AND COMMENT."
THE LAWYERS CO-OPERATIVE PUBLISHING CO.,
ROCHESTER, N. Y.

NEW YORK:
177 BROADWAY.

BOSTON:
10 TREMONT ST.

CHICAGO:
RAND-MCNALLY BLDG.

## Building and Loan Associations.

A receiver of a building and loan association is denied authority to foreclose a mortgage under a power of sale contained in a mortgage held by the association. Strauss *v.* Carolina Interstate B. & L. Asso. (N. C.) 30 L. R. A. 693. The case decides also that the affairs of an insolvent association are to be settled by charging borrowers interest on the amounts they have received, with a credit for all they have paid into the concern as dues, fines, or in other ways.

## Carriers.

A statute as to the assumption of risks by a passenger on any railroad when riding on the platform of a car is, in the case of Vail *v.* Broadway R. Co. 147 N. Y. 377, 30 L. R. A. 626, denied application to persons riding on the platform of a street car.

The failure of a carrier's agent to stamp the return coupon of a round-trip ticket as required by the carrier's regulations is held, in Northern Pac. R. Co. *v.* Pauson (C. C. App. 9th C.) 30 L. R. A. 730, to be insufficient ground for the expulsion of a passenger presenting such ticket, where he had delivered it to the agent and received it again under circumstances justifying the belief that it was properly stamped.

An agreed valuation of goods made to obtain a lower rate of freight is held, in J. J. Douglas Co. *v.* Minnesota Transfer R. Co. (Minn.) 30 L. R. A. 860, to be binding upon the shipper as a limitation of the carrier's liability for the loss of the property.

## Checks.

An attempt to stop payment of a draft by intercepting it in the mail, where it was sent by a bank at the request of a customer to pay a draft on him, is held in Canterbury *v.* Bank of Sparta (Wis.) 30 L. R. A. 845, to be ineffectual to defeat the creditor's right to the draft, although the bank sent it in ignorance of the insolvency of its customer, to whom it extended credit for the amount. This case is decided on the theory that the draft had been delivered to the payee by mailing it. A note to the case shows that the courts have generally permitted a draft or check to be intercepted.

## Commerce.

A shipment between points in the same state is held to constitute interstate commerce, in Houston Direct Nav. Co. *v.* Insurance Co. of North America (Tex.) 30 L. R. A. 713, where the shipment is the beginning of a continuous trip, with only a stop to change carriers at the point to which it is carried on the original contract.

## Contracts.

The principle that no recovery can be had for the purchase price of articles sold for unlawful use is applied in Storz *v.* Finkelstein (Neb.) 30 L. R. A. 644, to the sale of beer to a person engaged in a retail traffic therein by virtue of a license held by the seller.

A contract to place a person on valuable public lands then withdrawn from market for railroad purposes, and to procure legislation forfeiting the lands to the government, with a preference to persons who had settled on them, is held, in Houlton *v.* Dunn (Minn.) 30 L. R. A. 737, to be void as against public policy; and a note to the case reviews the authorities on the validity of a contract for services to procure legislation. But the employment of an agent by the legislature of a state to prosecute claims on behalf of the state against the United States for a contingent fee is held in Davis *v.* Com. 164 Mass. 241, 30 L. R. A. 743, to be valid on the ground that the legislature can determine for itself what public policy requires.

## Corporations.

Ownership of all the shares of a corporation by a less number of persons than the law permits, and the want of officers by reason of failure to elect or death, and the burning of a mill which it was the object of the corporation to carry on, are held in *Re* Belton, 47 La. Ann. 1614, 30 L. R. A. 648, to be insufficient to work a dissolution of the corporation. On the death of the person having possession of all the property of such corporation, it is held that his administrator is not entitled thereto, but that it should be placed under control of corporate agencies.

## Courts.

A suit by a foreign corporation in a court of equity is held in National Teleph. Mfg. Co. *v.* Dubois (Mass.) 30 L. R. A. 628, to be a matter of comity and not of strict right. Therefore jurisdiction is refused on service by publication against a nonresident to reach an interest as partner in a firm whose chief place of business and property are in another state in which a majority of the partners live.

## Damages.

In the recovery by a married woman for personal injuries, it is held, in Harmon *v.* Old Colony R. Co. (Mass.) 30 L. R. A. 658, that the impairment of her capacity to labor cannot be considered as an element, although the statutes entitle her to make contracts on her own account, and give her a right to her own earnings.

## Gas.

An injury to shade trees by the escape of natural gas carelessly suffered to escape from a gas main in an adjoining street is held, in Evans *v.* Keystone Gas Co. 148 N. Y. 112, 30 L. R. A. 651, to render the gas company liable to the owner of the trees for damages.

The duty of a gas company to turn on the gas when proper connections have been made for supplying it to a customer is held, in Schmeer *v.* Gaslight Co. 147 N. Y. 529, 30 L. R. A. 653, to require proper precautions to ascertain the condition of the pipes in the building to be supplied; but the company is held not liable for the act of a stranger in turning the gas into the pipes without its knowledge or request. The question of contributory negligence in searching for a leak of gas with a lighted candle is treated as one for the jury.

## Homestead.

A building which is the only home of a family is held exempt as a homestead, in De Ford *v.* Painter, 3 Okla. 80, 30 L. R. A. 722, although the basement and first floor and a part of the second floor are rented for business purposes.

## Husband and Wife.

A woman who has been given the custody of minor children on obtaining a divorce is held, in Brown *v.* Smith (R. I.) 30 L. R. A. 680, to have no right of action against the estate of her deceased husband for their board.

## Injunctions.

The rendition of a justice's judgment for more than is demanded by an affidavit of attachment is held, in Gum-Elastic Roofing Co. *v.* Mexico Pub. Co. 140 Ind. 158, 30 L. R. A. 700, to be insufficient ground for an injunction against its execution. So, an injunction is denied against a judgment at law rendered against an infant, merely because of the failure to appoint a guardian *ad litem* for him or to bring his general guardian into the action. Levystein *v.* O'Brien (Ala.) 30 L. R. A. 707. With these cases is an extensive note on injunctions against judgments for errors and irregularities.

One against whom a default judgment was fraudulently entered is held, in Merriman *v.* Walton, 105 Cal. 403, 30 L. R. A. 786, to be entitled to an injunction against its execution, although he could resort to certiorari. A note to this case presents the numerous authorities as to injunctions against judgments obtained by fraud, accident, mistake, surprise, and duress.

The power of a court of chancery to enjoin a trespass upon land and the boxing and scraping of trees to obtain turpentine is sustained in Wiggins *v.* Williams (Fla.) 30 L. R. A. 754, by virtue of a statute, notwithstanding the constitutional guaranty of a right to trial by jury; but the act is held inoperative in respect to an award of damages for a mere trespass cognizable at law.

## Insurance.

Life insurance taken by a man before marriage is held to be "effected by a husband" within the meaning of a statute giving the benefit of such insurance to widow, children, and next of kin. Rose *v.* Wortham (Tenn.) 30 L. R. A. 609. The term "legal representatives" in such a policy in a description of the beneficiaries, is held not to give the executor or administrator any beneficial interest so as to defeat the right of widow, children, and next of kin to take the proceeds free from claims of creditors. A note to the case re-

views the authorities as to the meaning of the words "legal representatives" in life insurance policies.

While a member of a benefit society agreeing to be bound by all laws then in force or that may thereafter be enacted, is subject to a subsequent rule, duly enacted, destroying liability for death by suicide, it is held, in Supreme Lodge K. of P. *v.* La Malta (Tenn.) 30 L. R. A. 838, that the enactment of laws is beyond the power of a board of control of an endowment rank, although it is given by the supreme lodge the "entire charge and full control" of such rank, and that the supreme lodge cannot delegate to such a body the power to enact general laws unless expressly authorized by its charter to do so.

Clerks or employees of insurance agents, to whom they delegate authority to discharge their functions within the scope of the agency, are held, in Goode *v.* Georgia Home Ins. Co. (Va.) 30 L. R. A. 842, to have power to bind the insurer to the same extent that the agents themselves could do.

Insurance on a stock of merchandise is held, in Maril *v.* Connecticut Fire Ins. Co. 95 Ga. 604, 30 L. R. A. 835, to permit the keeping and use of such inflammable substances as are a necessary, usual, and customary incident to the business, notwithstanding a printed condition prohibiting it and denying liability for the loss if such articles are kept on the premises. Substantially the same decision was made in Faust *v.* American Fire Ins. Co. (Wis.) 30 L. R. A. 783.

The fact that employees occasionally sleep in a house, and that some provisions are kept in the house which is visited to obtain them is held, in Agricultural Ins. Co. *v.* Hamilton (Md.) 30 L. R. A. 633, to be insufficient to prevent the house from being vacant or unoccupied within the meaning of an insurance policy.

A rider attached to a marine policy blank, on which is written a contract insuring a vessel against fire, waiving all provisions which conflict with those contained in a fire policy blank, is held, in Jackson *v.* British America Assur. Co. (Mich.) 30 L. R. A. 636, to leave a provision in the marine blank for navigation by the vessel operative, as this does not conflict with a clause in the fire policy blank describing the location of the property. A note to this case presents the decisions as to the effect of riders or slips attached to insurance policies.

Insurance on a family homestead by a policy issued to husband and wife is held in Webster *v.* Dwelling House Ins. Co. 53 Ohio St. 79, 30 L. R. A. 719, to be valid, although the title to the dwelling was wholly in the wife and the title to the personalty wholly in the husband.

An employer's liability policy is construed in Anoka Lumber Co. *v.* Fidelity & C. Co. (Minn.) 30 L. R. A. 689, in which it is held to be something more than a contract of indemnity, and to make the insurer liable to the employer when a judgment against him has been obtained by the employee, although he has not paid the judgment. It is also held that the claim of the assured did not pass by an assignment under an insolvency law, but that it was subject to garnishment by the employee.

## Landlord and Tenant.

A covenant by the lessor of a hotel to keep in good repair the outside of the premises is held, in Miller *v.* McCardell (R. I.) 30 L. R. A. 682, to bind him to repair the roof so as to make the building habitable, even if it was out of repair when the lease was made; and it is held not sufficient for him to keep it in the same condition as it was when leased.

An abatement of so much of the rent as was paid for the building is held, in Taylor *v.* Hart (Miss.) 30 L. R. A. 716, to be required by Miss. Code 1892, § 2498, on the destruction of a building which constituted a material part of a lease, although it was rural property. It is held that the statute is not limited to urban property.

## Liens.

A statute saving mortgages and other encumbrances on land at the time of the inception of other liens is held, in Oriental Hotel Co. *v.* Griffiths (Tex.) 30 L. R. A. 765, to make the beginning of work upon the building the time of the inception of a mechanic's lien afterwards filed therefor, so as to give that lien priority over a mortgage given upon the building before its completion and before the lien was filed. To the same effect it is held in Vilas *v.* McDonough Mfg. Co. (Wis.) 30 L. R. A. 778, that a mechanic's lien for machinery placed in a mill is superior to a prior mortgage taken on the premises when the mill was unfinished, where the statute makes such liens prior to any which originate subsequent to the commencement of the construction of work for which the lien is claimed.

## Master and Servant.

A railroad company which allows a brake-staff to remain loose in its socket and bent at an angle of thirty degrees from the perpendicular, when used by brakemen and switchmen in mounting a flat car used in front of a road engine for switching purposes, is held, in Prosser *v.* Montana Cent. R. Co. (Mont.) 30 L. R. A. 814, to be guilty of negligence toward the employees; and the contributory negligence of the latter is a question for the jury.

## Mines.

A case of extraordinary importance upon the rights of miners is that of Fitzgerald *v.* Clark (Mont.) 30 L. R. A. 803, in which it is held that a vein which enters on an end line and passes out of a side line of a location may be followed through the side line between parallel vertical planes let fall through such end line and the intersection of the vein with the side line. The court clearly disapproves of the doctrine of the Supreme Court of the United States in King *v.* Amy & S. Consol. M. Co. 152 U. S. 222, 38 L. ed. 419. That decision was respecting a location in which the vein crossed both side lines and neither of the end lines, so that the decision that the side lines were in reality the end lines, and must be so considered, did not cover the case now decided.

## Mortgages.

The South Carolina statute giving precedence over any railroad mortgage to a judgment for personal injuries, though subsequent in time, is held, in Southern R. Co. *v.* Bouknight, 70 Fed. Rep. 442, 30 L. R. A. 823, to be operative in case of a mortgage by a consolidated company formed by corporations of different states, although the entire property was sold as a unit,—especially as against a purchaser who agreed to pay all claims adjudged to be prior in lien to the mortgage.

The fiduciary relation which exists between tenants in common holding under the same conveyance, or in possession recognizing the joint or common right of each, is held in Fielding *v.* White (Tex. Civ. App.) 32 S. W. 1054, not to exist between grantees by separate conveyances of undivided interests in land, each assuming payment of half the amount of a mortgage thereon, so as to prevent one of them from acquiring title to the whole property to the exclusion of the other by the purchase at a sale under foreclosure of the mortgage.

## Officers.

The disability of a member of the legislature to hold office, under a constitutional provision that he shall not hold office "during the time for which he is elected" is held, in State, Childs, *v.* Sutton (Minn.) 30 L. R. A. 630, to continue for the entire period of time for which he was elected, notwithstanding his resignation.

The erroneous order of a mayor for the imprisonment of a person for contempt, when made in court and within the exercise of his power, is held, in Scott *v.* Fishblate (N. C.) 30 L. R. A. 696, not to make him liable to a civil action.

## Pardon.

A constitutional provision forbidding exile is held, in *Ex parte* Hawkins (Ark.) 30 L. R. A. 736, inapplicable to a pardon of a convict made on condition that he leave the state and never return.

## Railroads.

A mere passenger in a wagon driven by another over whom he has no control is held, in Howe *v.* Minneapolis, St. P. & S. S. M. R. Co. (Minn.) 30 L. R. A. 684, to be under an obligation to exercise reasonable care to avoid danger although not strictly within the rule that he must look and listen for trains at a railway crossing. His negligence in failing to do so is a question for the jury.

## Schools.

Extra compensation to a teacher of a common school from pupils taking certain higher branches is held lawful in Major *v.* Cayce (Ky.) 30 L. R. A. 697, when allowed by his contract with the school trustees, and the statutes do not require him to teach any other than common-school branches unless his contract so specifies, while the statutes entitle the pupils to free tuition in certain studies.

### State Institutions.

A lease of state property vested in trustees constituting a corporation, when the property is held for public use, is held, in Smith *v.* Cornelius (W. Va.) 30 L. R. A. 747, to be *ultra vires* and void; and it is declared that a public corporation vested with powers to be exercised for the public cannot transfer the exercise of such powers to another.

### Subrogation.

One who fraudulently obtains money on a mortgage, representing that his property is unencumbered, is held, in Union Mortgage B. & T. Co. *v.* Peters, 72 Miss. 1058, 30 L. R. A. 829, to be estopped to contest the right of the mortgagee to subrogation to earlier liens paid for with money advanced on the mortgage, on the ground that they are barred by the statute of limitations.

### Telegraphs.

A telegraph company which offers to carry telegraphic messages for the public being by statute in South Dakota a common carrier of such messages, it is held in Kirby *v.* Western Union Teleg. Co. 4 S. D. 105, 439, 30 L. R. A. 612, to be chargeable with the legal duty to carry such messages for any person at a reasonable time and place without any qualification of liability, although such an agreement qualifying liability, if freely made, may be binding.

### Waters.

A riparian proprietor on a stream which is suddenly diverted by the act of God so as to flow elsewhere is held, in Wholey *v.* Caldwell (Cal.) 30 L. R. A. 820, to have no right to go upon another's land to restore the water to the old channel, although the grant of his property specified the "water accustomed to flow in the stream." With this case will be found the authorities on the rights in the water of a stream as affected by the act of God or natural change of course.

The right of prior appropriation of waters is held, in Isaacs *v.* Barber (Wash.) 30 L. R. A. 665, to have existed as part of the laws and customs of the state of Washington east of the Cascade mountains prior to the act of Congress on that subject. The operation of a flouring mill is held to be one of the purposes for which water can be appropriated. An extensive note to this case presents the authorities on the right of prior appropriation.

A municipal corporation maintaining waterworks and imposing water rents for the use of water is held, in Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46, 30 L. R. A. 660, to do so in the exercise of governmental power and not as a private enterprise, and therefore it is held not to be liable for damages for fire resulting from a failure to maintain sufficient waterworks.

An attempt by a city to sell waterworks is held in Huron Waterworks Co. *v.* Huron (S. D.) 30 L. R. A. 848, to be invalid on the ground that they constitute property charged with a public trust of which the inhabitants of the city are the beneficiaries. The right of the city to recover possession of such waterworks is sustained without requiring it to repay money which had been received on such invalid sale.

A city which fails to make diligent search for a leak in its main water pipes or a service pipe running into private property therefrom within a reasonable time after notice of the leak is held in Hoin *v.* Lancaster (C. P.) 13 Lanc. L. Rev. 131, to be liable for damages caused to a third person.

## New Books.

"An Examination of the Nature of the State." A Study in Political Philosophy. By Westel Woodbury Willoughby, Ph. D. Macmillan & Co., New York and London. 1896. $3.

"Analyzed New York Court of Appeals Citations." By J. G. Green. Williamson Law Book Co., Rochester, N. Y. 1896. $5.

"The Combination, Consolidation, and Succession of Corporations." By Andrew J. Hirschl. Callaghan & Co. Chicago. 1896. $6.

"Code Pleading." By George L. Phillips. Callaghan & Co. Chicago. 1896. $5.

"Attachment and Garnishment." By Roswell Shinn. The Bowen-Merrill Co. Indianapolis, Kansas City. 2 Vols. 1896. $12.

"Revised Statutes of North Dakota of 1895." Carter Publishing Co. Pierre, S. D. 1896. $10.

"Employers' Liability Acts." By Conrad Reno. Boston and New York. Houghton, Mifflin & Co. 1896. $5.

"Corporate Finance, Including the Financial Operations and Arrangements of Public and Private Corporations." By Wm. A. Reid. Albany. H. B. Parsons. 1896. 2 Vols. $12.

## The Humorous Side.

WILL SAVE THEIR MONEY.—A prominent attorney of Western New York, who has recently returned from a trip through the South, was asked the other day what he thought about the condition and prospects of that section. He said: "Well, the South is a great country. It is becoming prosperous and is destined to be very wealthy. In my opinion, sir, it will be only a few years before it will far surpass the North in wealth." "What makes you think so?" asked his questioner. "Because," said he, "the sand is so deep down there that the people can't ride bicycles."

HE SENT AN EXCUSE.—"On the night of the 15th of February it was claimed by the plaintiff's witnesses that the said plaintiff's house, supposed to be fired by chimney, burned down and he froze to death by being exposed to bad wether. Therefore there was no order made against the children only burial expences and costs. However he sent me a written note stating he was not able to come to court."

This is quoted from a true copy of a Florida justice's document after names of parties and witnesses and an entry of judgment for $30.70, under the following heading: "Title Children to Support Indigent Parents." The plaintiff's thoughtfulness and kindness surely deserve mention. After such discouraging experiences with the elements it was very courteous in him to send a written excuse for absence from court.

WEAKMINDED.—In discussing the testamentary capacity of a believer in spiritualism who thought he could receive directions from the spirits of the dead through mediums, the court in a late case says: "This led him to say and do many foolish things, and to live with different women without being married to them."

COOLING HER AFFECTION.—In holding that $5,000 was an excessive award for alienating a wife's affections, the court says that whatever affection she may have previously cherished for her husband "must already have been effectually eradicated when he is shown to have been committed to the county jail for setting his wife on a hot stove."

MIND WAS CLEAR AS YOURS.—The answer of a witness to a question as to the sanity of a testator is given in a late Illinois case as follows:

"A. In my opinion his mind was clear as yours or mine, but that he was subject to certain influences and certain ideas. In my opinion the man was crazy. Well, I don't mean by that he was at all what you might call a crazy loon on the street, but I think he was a man of very good judgment in his own ideas, but at the same time he was influenced in certain channels that would imply an unbalanced mind, so far as that influence was concerned, only."

ILLUMINED AT HIS OWN EXPENSE.—A recent opinion says:

"We fear that the determination of defendant not to understand plaintiff's claim for this unpaid balance of the contract price for this work is so obstinate that nothing but a judgment for the sum claimed—$160—will have any effect in enlightening it."

"WITH THE COVER UNSCRUED."—In one of several links of a chain of indorsements upon a holographic will lately contested in the District of Columbia, the testator says: "At my death, or after, I wish my body to be taken to Philadelphia, and deposited in the Macphelah Cemetery Vault with the cover unscrued and remain in that condition until friends or relatives are satisfied." A later indorsement begins as follows: "To provide for the demise when it should come, to the great proprietor of all. My clothing is to go to those that they fit. If there is more than one, a rough estimate is to be made and divided so recipients may have a word and be satisfied nephews first." In still another writing one of the specifications is as follows: "To Lizzy M'Intire Test. as she is raising more boys. Hence my Chest with all my clothing or wearing apparel, coat, vest, pants, shirts, drawers, socks, etc. The large double shawl, the vegtable studs goes with the shirts. The sewing apparatus. The 5 glass stopper vials."